

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

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**PORT AUTHORITY TRANS-HUDSON CORPORATION,**  
*Petitioner.*

— vs. —

**PATRICK FEENEY,**  
*Respondent.*

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**PORT AUTHORITY TRANS-HUDSON CORPORATION,**  
*Petitioner.*

— vs. —

**CHARLES T. FOSTER,**  
*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT

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**MOTION OF PAN AMERICAN WORLD AIRWAYS, INC.,  
UNITED STATES AVIATION UNDERWRITERS, INC. AND  
UNITED STATES AVIATION INSURANCE GROUP FOR  
LEAVE TO FILE BRIEF AS AMICI CURIAE**

AND

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**BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS**

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IN SUPPORT OF RESPONDENTS**

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Pan American World Airways, Inc. ("Pan Am"), United States Aviation Underwriters, Inc. ("USAU") and United States Aviation Insurance Group ("USAIG") hereby respectfully move, pursuant to Rule 37 of the Rules of this Court, for leave to file the attached brief as *amici curiae* in support of Respondents. The consent of the attorney representing Respondents has been obtained. The consent of the attorney representing Petitioner was requested but refused.

The interest of Pan Am, USAU and USAIG in these cases arises from the fact that Pan Am is a plaintiff, and USAU and USAIG were third-party defendants, prior to the granting of their motion for summary judgment, in a case pending in the United States District Court for the Eastern District of New York in which the same issue is before the court. *Pan American World Airways, Inc. v. The Port Authority of New York and New Jersey, et al.*, 86 CV 0938 (JMcL) (McLaughlin, J.). In that case, the Port Authority sought a remand to state court of that portion of the action that sought recovery against it, asserting that the Port Authority is immune from suit in the federal courts under the Eleventh Amendment to the United States Constitution. In this case, the Court is called on to decide whether the Port Authority, through Petitioner, the Port Authority's wholly owned subsidiary, is entitled to immunity from suit in federal court pursuant to the Eleventh Amendment to the United States Constitution.

In the appellate court below, Respondents argued primarily that the Federal Employers Liability Act created an exception to Eleventh Amendment immunity that Petitioner would otherwise have enjoyed. The constitutional issue raised before this Court, whether the Port Authority is entitled to Eleventh Amendment immunity in the first instance, was raised in the court of appeals by Pan Am, USAU and USAIG, through the filing of a brief *amici curiae*. That issue was not raised or discussed by Respondents.

Because Respondents may pursue the same arguments in this Court that they advanced in the court of appeals, it is believed that the brief that *amici curiae* are requesting leave to file will contain more complete argument on the constitutional issue. In addition, if the analysis advanced by *amici curiae* is accepted, it will be dispositive of the jurisdictional motion by the Port Authority in the above-mentioned action pending in the United States District Court for the Eastern District of New York.

Moreover, Pan Am and other airlines are, and for the foreseeable future will be, captive lessees of space and facilities from the Port Authority at John F. Kennedy, Newark and

LaGuardia International Airports. All airlines, including Pan Am, and their insurers have a profound interest in the procedures, discovery mechanisms and fora available to them in resolving current and future disputes with their landlord, the Port Authority.

In short, *amici* are not only directly affected by the instant case, because of the action in the Eastern District of New York, but also have a broader interest than that of Respondents in the outcome of these cases.

Accordingly, Pan Am, USAU and USAIG respectfully request that their motion for leave to file a brief *amici curiae* be granted, and that the brief annexed hereto be received by the Court.

January 12, 1990

Respectfully submitted,

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INTEREST OF PAN AMERICAN WORLD AIRWAYS, INC.,  
UNITED STATES AVIATION UNDERWRITERS, INC. AND  
UNITED STATES AVIATION INSURANCE GROUP  
AS AMICI CURIAE

Pan American World Airways, Inc. ("Pan Am") is a plaintiff, and United States Aviation Underwriters, Inc. ("USAU") and United States Aviation Insurance Group ("USAIG") were third-party defendants that were granted summary judgment, in an action pending against The Port Authority of New York and New Jersey ("Port Authority") in the United States District Court for the Eastern District of New York, 86 CV 0938 (JMcL) (McLaughlin, J.). The Port Authority moved to remand that portion of the action directed against it to state court on the ground that it is a "State" for Eleventh Amendment purposes and therefore entitled to immunity from suit in federal court. The district court denied that motion and placed the case on its trial calendar, ruling that the unanimous opinion of the Second Circuit Court of Appeals below in this case, holding that the Port Authority is not entitled to immunity under the Eleventh Amendment, *Feeney v. Port Authority Trans-Hudson Corp.*, 873 F.2d 628 (2d Cir.), *cert. granted*, 110 S. Ct. 320 (1989), was "both binding on this Court and dispositive of the issues raised in the instant motion." When this Court granted certiorari in these cases, Judge McLaughlin removed Pan Am's action from the trial calendar pending this Court's decision.

Pan Am, USAU and USAIG hold an evident interest in the outcome of the cases before this Court. Indeed, should this Court decide that the Port Authority is not entitled to immunity from suit in federal court under the Eleventh Amendment, the district court's jurisdiction over Pan Am's action against the Port Authority will be unassailable, thus preserving over two years of extensive discovery, pre-trial hearings and the district court's decision granting summary judgment in favor of USAU and USAIG.<sup>1</sup> As parties in a pending action having interests that may be

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<sup>1</sup> In the action pending in the Eastern District of New York, Pan Am also opposed the Port Authority's motion seeking remand on the ground that, even  
(Footnote continued)

directly and materially infringed by a decision of this Court holding the Port Authority, and derivatively PATH, to be a "State" entitled to immunity under the Eleventh Amendment, Pan Am, USAU and USAIG have a substantial interest in the outcome of the instant action.

Moreover, as captive lessees of space and facilities from the Port Authority at John F. Kennedy, Newark and LaGuardia International Airports, for the foreseeable future, Pan Am and its fellow airline lessees have a profound interest in the procedures, discovery mechanisms and venues available to them in resolving current and future disputes with their landlord, the Port Authority.

Finally, it was *amici* and not Respondents who raised the fundamental constitutional issues upon which the Second Circuit Court of Appeals based its decision and that are now before this Court. It is those constitutional issues that the Court must consider here.

#### SUMMARY OF ARGUMENT

The Eleventh Amendment, by its plain language, provides immunity from suit in federal court only to "one of the United States." In construing the Amendment's limited language, this Court has established a stringent test to determine if a bi-state entity created by compact, such as the Port Authority,<sup>2</sup> may claim such immunity: the enabling legislation creating the entity must show that the compacting states intended to confer such immunity upon the entity, with Congressional concurrence. Analysis of the pertinent legislation here discloses no such intent. To the contrary, the legislation's description of the Port Authority as the "municipal corporate instrumentality of the

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if it were determined to be entitled to immunity under the Eleventh Amendment, the Port Authority waived any such immunity by actively litigating the case for over two years and seeking affirmative relief from the court. That issue was not reached by the district court and is not addressed here.

<sup>2</sup> Because Petitioner PATH is a wholly owned subsidiary of the Port Authority, it is entitled to immunity only derivatively, upon a finding that the Port Authority is so entitled. Further references in this brief to the "Port Authority" are intended to be inclusive of its subsidiary, Petitioner PATH.

two states," its express limitation that the Port Authority "shall have no power to pledge the credit of either state or to impose any obligation upon either state" and the explicit statutory provision for venue in actions against the Port Authority in "a judicial district, established by one of said states or by the United States" demonstrates that New York and New Jersey did not intend to confer Eleventh Amendment immunity on the Port Authority. This absence of intent is further confirmed by the Port Authority's prior recognition that it is subject to suit in the federal courts, as evidenced by the fact that the Port Authority litigated in the federal courts for over four decades without raising any Eleventh Amendment immunity claim and without legislative interference; the State of New York's resort to litigation against the Port Authority; New York's and New Jersey's retention of the exclusive statutory right to sue the Port Authority for injunctive relief; and, most significantly, the legislatures' statutory insulation of the respective state treasuries from adverse judgments against the Port Authority. In considering these factors and applying this Court's test for analyzing the status of a bi-state entity for Eleventh Amendment purposes, the appellate court below properly held that the Port Authority is not cloaked with immunity.

This Court has held that where an entity other than a state seeks to avail itself of immunity under the Eleventh Amendment, the most critical inquiry is whether the suit seeks to "impose a liability which must be paid from public funds in the state treasury." The judgment sought in each case before this Court will have, and can have, no impact on the treasury of New York or of New Jersey. Indeed, review of the enabling legislation demonstrates that the standard articulated by this Court, that a judgment "must be paid from public funds in the state treasury," cannot be met here. Thus, it is evident that the Port Authority is not immune from suit in the federal courts.

Cases holding that Eleventh Amendment immunity extends to the Port Authority were, put simply, wrongly decided. The most important of those cases is the Third Circuit's decision in *Port Authority Police Benevolent Association v. Port Authority*

of New York and New Jersey, 819 F.2d 413 (3d Cir.), cert. denied, 484 U.S. 953 (1987), upon which Petitioner substantially relies here. In that case, an action seeking injunctive relief and not money damages, the Third Circuit misapplied this Court's test for determining whether a bi-state entity is a "State" for Eleventh Amendment immunity purposes, wrongly considering a hypothetical judgment's potential, indirect impact on the states' treasuries. When this Court's test is properly applied, as it was in the Second Circuit's decision below, it is manifest that the Port Authority is not entitled to invoke the immunity provided to "one of the United States" under the Eleventh Amendment. Accordingly, the decision below should be affirmed.

## ARGUMENT

### THE PORT AUTHORITY IS NOT ENTITLED TO ELEVENTH AMENDMENT IMMUNITY

The Eleventh Amendment provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. This not only bars suits against a state in federal court but also suits where, although not a named party, the state is the real party in interest. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974); 13 C. Wright, A. Miller, and E. Cooper, *Federal Practice and Procedure* § 3524 (2d ed. 1984). Thus, where an action is brought against an agency or department of a state, Eleventh Amendment immunity applies. *E.g., Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 100 (1984).

More difficult is determining whether there is Eleventh Amendment immunity when the defendant is neither a state nor a state agency or department. In such a case, the pivotal inquiry is whether the judgment sought will be paid out of the

state treasury. *Edelman v. Jordan*, 415 U.S. 651, 663; *see also Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 at 400-01 (1979). Moreover, when the defendant is a bi-state entity, such as the Port Authority, Eleventh Amendment immunity will only apply if the legislation creating it establishes that the compacting states intended to confer such immunity and Congress concurred in that determination. Because New York and New Jersey did not intend to confer such immunity on the Port Authority, and because judgments in *Feeney* and *Foster* will not be paid out of the state treasury of New York or of New Jersey, the Port Authority is not entitled to Eleventh Amendment immunity.

#### A. There is Insufficient Evidence Of Intent To Cloak The Port Authority, Or Derivatively PATH, With Eleventh Amendment Immunity.

The analysis of whether a bi-state entity, like the Port Authority, is entitled to invoke Eleventh Amendment immunity begins with this Court's decision in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391. There, the Court considered whether the Tahoe Regional Planning Agency ("TRPA"), an entity created by compact between the States of California and Nevada to coordinate and regulate development in the Lake Tahoe basin, was entitled to Eleventh Amendment immunity. The action against the TRPA sought monetary damages and equitable relief.

This Court rejected the Ninth Circuit's "expansive reading of the Eleventh Amendment" and reversed the finding that the TRPA was entitled to Eleventh Amendment immunity. *Id.* at 396. The Court wrote:

By its terms, the protection afforded by that Amendment is only available to "one of the United States." It is true, of course, that some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself. But the

Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a "slice of state power."

*Id.* at 400-01 (footnote omitted).

Further, this Court held that an entity created by compact, such as the Port Authority, would not be entitled to Eleventh Amendment immunity absent evidence showing that the compacting states intended to confer such immunity, stating:

Unless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose, there would appear to be no justification for reading additional meaning into the limited language of the [Eleventh] Amendment.

*Id.* at 401. An examination of the pertinent legislation and operations of the TRPA compelled the conclusion that the states did not intend to extend Eleventh Amendment immunity to it. *Id.* at 401-02.

This Court's decision in *Lake Country Estates* imposes a rigorous test that a bi-state entity must satisfy before it can successfully claim Eleventh Amendment immunity. When applied to the Port Authority, that test compels the conclusion that the compacting states did not intend to cloak the Port Authority with such immunity.

A review of the statutes creating and structuring the Port Authority reveals no legislative intent to confer immunity. See N.Y. Unconsol. Law § 6401 *et seq.* (McKinney 1979); N.J.S.A. 32:1-1 *et seq.* (West 1963). In fact, such review indicates the directly contrary intent.

The Port Authority was created by a bi-state compact entered into in 1921 and approved by Congress. The statutes creating

the Port Authority describe the entity as "the municipal corporate instrumentality of the two states" and "a body corporate and politic." N.Y. Unconsol. Law §§ 6459, 6404 (McKinney 1979). The Port Authority is empowered to "purchase, construct, lease and/or operate any terminal or transportation facility" within its geographic authority. *Id.* § 6407. It is further authorized to borrow money in its own name and to secure such debts through the issuance of bonds or the mortgaging of its own properties. *Id.* The Port Authority is barred from pledging the credit of either state, *id.* § 6408, and has "no power to pledge the credit of either state or to impose any obligation upon either state, or upon any municipality," *id.* § 6459.

From these provisions alone, it is clear that "the States [did not structure the Port Authority] to enable it to enjoy the special constitutional protection of the States themselves." *Lake Country Estates*, 400 U.S. at 401. To the contrary, the states created an independent entity, analogous to a county, municipality or "municipal corporate instrumentality."

The conclusion derived from legislation concerning the Port Authority is that the states intended that the Port Authority would be subject to suit in federal court. Generally, the applicable statutes provide that the Port Authority may sue and be sued. See N.Y. Unconsol. Law § 7101 *et seq.* (McKinney 1979) and N.J.S.A. § 32:1-157 (West 1963). These statutes nowhere expressly provide or suggest that such suits may not be brought in federal court. In fact, in the venue provision, the states consented to federal court jurisdiction over the Port Authority by providing:

The foregoing consent is granted upon the condition that venue in any suit, action or proceeding against the port authority shall be laid within a county or a judicial district, established by one of said states or by the United States, and situated wholly or partially within the port of New York district.... Although the port authority is engaged in the performance of governmental functions, the said two states consent to liability on the part of the port authority

*in such suits, actions or proceedings for tortious acts committed by it and its agents to the same extent as though it were a private corporation.*

N.Y. Unconsol. Law § 7106 (McKinney 1979) (emphasis added). *See, also*, N.J.S.A. § 32:1-171 (West 1963). The reference to venue in a "judicial district, established by . . . the United States" clearly refers to actions brought in federal court.

In addition, the Port Authority has participated in litigation in the federal courts for over four decades, as plaintiff, defendant or intervenor. The Port Authority and its agents and affiliates are identified as plaintiffs, defendants or intervenors in over one hundred citations to decisions rendered in the federal courts during that period. At least until *Port Authority Police*, the first case we have found in which the Port Authority argued that it was a "State" immune from suit in federal court under the Eleventh Amendment, the Port Authority apparently did not dispute that it was subject to suit in federal court.

Moreover, the Port Authority's newly adopted strategy of asserting Eleventh Amendment immunity appears to be exercised most selectively. As noted above, the Port Authority actively litigated with Pan Am, USAU and USAIG for over two years, through the completion of discovery and the filing of a pre-trial order. Only after receiving an adverse decision on a motion for partial summary judgment on a key issue in the case did it raise, for the first time, a claim of Eleventh Amendment immunity. Conversely, over four months after vigorously arguing to the Second Circuit Court of Appeals that it was immune from suit in federal court in the instant action, the Port Authority urged the same court, in an unrelated case, to affirm a decision favorable to it on the merits, apparently without raising any claim of immunity. *Automobile Club of New York v. The Port Authority of New York and New Jersey*, 887 F.2d 417 (2d Cir. 1989).

Significantly, even though the Port Authority has repeatedly participated in suits in federal court, New York and New Jersey never objected. The states would have simply had to adopt

legislation providing that the Port Authority's consent to be sued, N.Y. Unconsol. Law § 7101 (McKinney 1979) and N.J.S.A. § 32:1-157 (West 1963), only extended to actions brought in state court. Neither state passed such legislation.

Had New York and New Jersey wished to confer Eleventh Amendment immunity on the Port Authority, they surely were aware of what would be needed to do so. For example, legislation in New York relating to another bi-state entity, the Tri-State Regional Planning Authority, expressly provides that the authority will:

enjoy the sovereign immunity of the party states and may not be sued in any court or tribunal whatsoever.

N.Y. Unconsol. Law § 8311 (McKinney 1979). Although that language also deals with the related concept of sovereign immunity, it has been held to provide the Tri-State Regional Planning Authority with Eleventh Amendment immunity because it meets the *Lake Country Estates* requirement that the compacting states "structured" the entity to enjoy the constitutional protection enjoyed by the states. *Council of Commuter Organizations v. Metropolitan Transportation Authority*, 683 F.2d 663, 672 (2d Cir. 1982). It is thus clear that when New York intends to extend immunity to a bi-state entity, it knows how to do so in unequivocal language.

Finally, in deciding whether a bi-state entity has immunity, this Court looks to the past relationship between the state and the entity. As Petitioner concedes in its brief, whether the states have ever resorted to litigation against the entity (undeniably a telling demonstration of a creator's view as to its own intent) is a key factor in determining the entity's status for Eleventh Amendment purposes:

Indeed, this Court was particularly impressed by the fact that the TRPA was so independent of State control that one of the Compacting States, California, had "resorted to litigation in an unsuccessful attempt to impose its will" on the agency.

Petitioner's brief at 10 (quoting *Lake Country Estates*, 440 U.S. at 402). Applying this standard, it cannot seriously be argued that New York considers the Port Authority to be a state agency since it has resorted to litigation against it. See *New York v. Port Authority of New York and New Jersey*, 64 Misc. 2d 563, 315 N.Y.S.2d 9 (Sup. Ct. N.Y. County 1970). Moreover, the creating states have retained the exclusive statutory right to sue the Port Authority for injunctive relief. N.Y. Unconsol. Law § 7105 (McKinney 1979) and N.J.S.A. § 32:1-161 (West 1963). It is inconceivable that either New York or New Jersey would have formally adopted and retained a statutory right to sue itself.

**B. Neither The Port Authority Nor PATH Is Entitled To Eleventh Amendment Immunity Because A Civil Judgment Against Either Entity Will Not Impact On A State Treasury.**

Even assuming that New York and New Jersey intended to confer Eleventh Amendment immunity on the Port Authority, that immunity would not apply on the facts of the instant cases. In determining whether an entity other than the state itself is entitled to immunity in a particular case, a federal court may consider a number of criteria, but the key factor is whether a judgment in the action will be satisfied from the state treasury. *Edelman v. Jordan*, 415 U.S. at 663.

In *Trotman v. Palisades Interstate Park Commission*, 557 F.2d 35 (2d Cir. 1977), the Second Circuit Court of Appeals considered whether the Park Commission, a bi-state entity created by compact, had Eleventh Amendment immunity and stated:

While there are many factors which must be considered in determining whether a state instrumentality can raise the bar of the Eleventh Amendment in a particular suit, the most significant is whether any liability against the agency must be paid from public funds in the state treasury. . . .

. . . We believe that if the nature and effect of a suit against the Commission would be to impose a

liability which *must* be paid from public funds in the state treasury of one of the signatory states, then that suit is barred by the Eleventh Amendment.

557 F.2d at 38 (footnote omitted) (emphasis added). The court concluded that the action was actually against the State of New York because the Park Commission would have to satisfy any judgment out of appropriations made by that state's legislature which must be paid from the state's treasury. See also *Ram Ditta v. Maryland National Capital Parks and Planning Commission*, 822 F.2d 456, 457 (4th Cir. 1987) ("in determining whether an entity is the *alter ego* of the state, it is generally held that the most important consideration is whether the state treasury will be responsible for paying any judgment that might be awarded"); *Fay v. South Colonie Central School District*, 802 F.2d 21, 27 (2d Cir. 1986) (school district not entitled to assert Eleventh Amendment immunity because it "has not established that payment of money damages to [plaintiff] will come directly from the state treasury"); *Jones v. Smith*, 784 F.2d 149, 152 (2d Cir. 1986) (claim against state official barred by Eleventh Amendment as the State would have to pay any damages awarded); *Dwyer v. Regan*, 777 F.2d 825, 835-36 (2d Cir. 1985) (that portion of action seeking an award of back pay from employing agency barred by Eleventh Amendment because it would "necessarily have to be satisfied from State funds"), modified, 793 F.2d 457 (2d Cir. 1986); see generally, 13 C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure* § 3524 at 129 (2d ed. 1984).

The judgment sought in the cases before this Court, *Feeney* and *Foster*, will have no impact on the treasury of either New York or New Jersey. There is nothing to indicate that PATH itself will be unable to pay the judgments. Moreover, even if PATH could not satisfy the judgments, its parent, the Port Authority, has more than adequate resources to do so. The Port Authority is a self-sustaining entity, funding its operations from the revenues it generates. It describes itself as follows:

Unlike many other authorities and governmental agencies, the Port Authority, by law, must be self-supporting. It has neither the power to tax nor the

right to pledge the credit of either state in support of its general obligations.

The Port Authority pays its own way for operations and capital investment, pooling revenues earned from its facilities through rents, fees, fares, tolls and other user charges. It finances new construction, major improvements and repairs by selling its bonds and other obligations.

*Comprehensive Annual Financial Report of the Port Authority of New York and New Jersey for the Year Ended December 31, 1987*, 10; *see also* N.Y. Unconsol. Law § 7002 (McKinney 1979). By law, the Port Authority can only seek funding for operations from the state legislatures if "revenues from operations conducted by the Port Authority are [not] adequate to meet all expenditures." N.Y. Unconsol. Law § 6416 (McKinney 1979). Moreover, such funding is statutorily restricted to "salaries, office and other administrative expenses," may only be provided upon approval of the respective governors and may not exceed "one hundred thousand dollars in any one year." *Id.*

At year end 1987, for example, the Port Authority's General Reserve Fund balance was \$293,249,000. *See Comprehensive Annual Financial Report*, 30-31, 51. This far exceeds the combined judgments sought in the instant cases. But even if the funds proved insufficient, the authorizing statutes themselves preclude resort to the states' treasuries for satisfaction of civil judgments. N.Y. Unconsol. Law § 6416 (McKinney 1979).

### C. The Third Circuit's Holding In *Port Authority Police* Rests On A Flawed Eleventh Amendment Analysis.

In support of its Eleventh Amendment claim, Petitioner relies heavily on the decision of the United States Court of Appeals for the Third Circuit in *Port Authority Police*, 819 F.2d 413, an action seeking injunctive relief and not money damages, where the court extended Eleventh Amendment immunity to the Port Authority. The decision, however, rests on a flawed Eleventh Amendment analysis.

In *Port Authority Police*, the court examined the status of the Port Authority for Eleventh Amendment purposes against the backdrop of this Court's decision in *Lake Country Estates*, 440 U.S. 391. In finding the Port Authority immune from suit, the Third Circuit focused exclusively on the individual factors set out in *Lake Country Estates* but failed to consider the overarching inquiry, whether the compacting states intended to confer Eleventh Amendment immunity on the Port Authority.

As noted above, the pivotal inquiry is whether an adverse judgment will be paid out of the state treasury. The Third Circuit reasoned that if a hypothetical judgment against the Port Authority was "serious enough to deplete its resources, the Authority would be able to go to the state legislatures in order to recoup the amount needed for its operating expenses." *Port Authority Police*, 819 F.2d at 416. As demonstrated by the relevant statutory language set forth above, this conclusion is ill-founded because the states' obligation to fund the Port Authority's operations is restricted by statute, and does not include an obligation to fund the payment of judgments.

Further, because the plaintiffs in *Port Authority Police* sought injunctive relief only, the court relied on a hypothetical "serious" judgment that would be paid out of the state treasury to the extent that it exceeded the Port Authority's own resources. The proper analysis, at least where the action seeks money damages, as in the cases at bar, is whether a judgment in a given suit would "impose a liability which *must* be paid from public funds in the state treasury." *Trotman*, 557 F.2d at 38 (emphasis added).<sup>2</sup>

The issue of whether a money judgment must be paid from state funds to cloak a government defendant with Eleventh Amendment immunity was the focus of the decision in *Travelers Indemnity Company v. School Board of Dade County, Florida*,

<sup>2</sup> To the extent that the reasoning in *Port Authority Police* is based on the proposition that a judgment could have an indirect effect on the state treasury because the Port Authority might have to seek additional funding from the states if it encountered a shortfall after paying a sizeable judgment, it is simply (Footnote continued)

666 F.2d 505 (11th Cir.), *cert. denied*, 459 U.S. 834 (1982). There, a surety on a performance bond, who had arranged for the completion of a construction project contracted for by the county school board, sought damages from the board. The board argued that it had obtained state funds for the construction contract and that those funds would be used to satisfy any judgment taken against the board. It contended that it was an arm of the state entitled to Eleventh Amendment immunity in that particular case. The Eleventh Circuit disagreed, stating:

*Edelman* makes it clear that the Eleventh Amendment protection is available only if satisfaction of the judgment sought against the state "agency" *must* under all circumstances, be paid out of state funds. As we have already indicated, there is no contention, and no facts to support such a contention, if made, that there is any prohibition by state law or constitution that would prevent the county board of education from satisfying a judgment in this lawsuit out of county funds not in any way derived from the state of Florida.

*Id.* at 509 (emphasis in original).

This conclusion was echoed in *Jacintoport Corp. v. Greater Baton Rouge Port Commission*, 762 F.2d 435 (5th Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986). There, the plaintiff sought injunctive relief or, in the alternative, money damages from the Port Commission. The district court held that the Port Commission was entitled to Eleventh Amendment immunity. The Fifth Circuit reversed, principally on the ground that the Port Commission was financially independent of the state, noting that "[t]he purpose of the immunity therefore largely disappears when a judgment against the entity does not entail a judgment against the state." 762 F.2d at 440. The court then observed:

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wrong. The fact that an action may have an indirect effect on the state treasury is irrelevant to Eleventh Amendment analysis. See, e.g., *Finkielstain v. Seidel*, 692 F. Supp. 1497, 1506-07 (S.D.N.Y.), *aff'd in part and rev'd in part*, 857 F.2d 893 (2d Cir. 1988).

On the record before us, it appears that any judgment obtained by Jacintoport can be satisfied by the Commission itself. . . . That record shows that even the most favorable estimation of Jacintoport's monetary damages does not reach a tenth of the Commission's surplus revenue in a "good year" — of which it has had several recently. The State of Louisiana will not incur liability on this judgment's account. We specifically decline to reach the question of this Commission's immunity in an instance where the size and nature of the judgment sought would clearly result in liability for the state.

*Id.* at 441. See also *Zeidner v. Wulforst*, 197 F. Supp. 23 (E.D.N.Y. 1961); *Levitt v. State of Maryland Deposit Insurance Fund Corp.*, 643 F. Supp. 1485, 1489-91 (E.D.N.Y. 1986).

As the foregoing cases make clear, the state is only the real party in interest for Eleventh Amendment purposes if the money judgment sought against the government entity must be paid directly from the state coffers. In *Port Authority Police*, the court misapplied this analysis by positing an unlikely, hypothetical money judgment, not even at issue there, to support its holding. Based on the foregoing, *amici* respectfully submit that when the Court's test is properly applied, the Port Authority is not entitled to Eleventh Amendment immunity.

**CONCLUSION**

The Port Authority is not immune from suit in federal court under the Eleventh Amendment because the legislatures of the states that created it did not intend to confer such immunity, and because a judgment in the cases presently before this Court will have no impact on the treasuries of New York or New Jersey. Accordingly, the order of the Second Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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